STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. B-04/09-223
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families computing his patient share for Long-Term Care Medicaid. The issue is how the monies that are paid directly from his military retirement pension to his ex-wife should be treated when computing petitioner's countable income for Long-Term Care Medicaid.

The parties have stipulated to the facts and briefed the legal issues.

FINDINGS OF FACT

1. The petitioner is sixty-eight years old and a resident of a local nursing home. The petitioner was found eligible for Long-Term Care Medicaid in June 2007.

2. On April 2, 2009, the Department sent petitioner a Notice of Decision that the alimony he paid his ex-wife was not an allowable deduction and that his patient share

remained at $2,382.34 per month.[1] Petitioner appealed from this decision.

3. The petitioner's income consists of a monthly Social Security Retirement benefit of $904.80 (before a $96.40 deduction for a Medicare premium) and a U.S. Department of Defense monthly pension of $1,629.00 (before a deduction of $381.45 that is paid directly to his ex-spouse for her support) for a total of $2,533.80.

4. The petitioner was divorced by his ex-wife, P.C., on November 2, 1999, Chittenden County Family Court, Docket No. F-834-10-99 Cndm. The Final Stipulation and Judgment Order and Decree stated on page 2:

> 6. The Defendant [petitioner] shall pay $200.00 per month alimony to the Plaintiff [P.C.], now and permanently in the future, in the form of a government allotment check from his monthly military retirement check...Neither party shall make any claim against any pension rights...and any other incidents of employment of the other. The plaintiff shall remain as beneficiary of the Defendant's life insurance policies.

5. Petitioner paid alimony sporadically to P.C. from the date of divorce, November 2, 1999 until April 2004.

6. Beginning in April 2004, petitioner agreed to a deduction from his military pension check to P.C. The monthly amount is $381.45 in consideration of unpaid support

[1] Prior to 2009, it appears that the Department by mistake deducted the amount of alimony.

and in consideration of petitioner cashing in his life insurance policies. The petitioner can stop the deduction from his military pension check.

7. P.C. has income below the Federal Poverty Level for a household of one ($991.00), even with the receipt of the military allotment.

8. The only monthly deductions that the Department has allowed from petitioner's income in their calculations of patient share are a personal needs allowance and the Medicare Part B premium of $96.40.

9. The petitioner's court-ordered alimony payments and his current patient share are greater than his total income.

ORDER

The Department's decision is affirmed.

REASONS

The petitioner raises questions regarding the Department's treatment of monies directly paid to his ex-spouse, P.C., from his military retirement pension. The Department considers these monies as available to the petitioner and bases their determination of petitioner's patient share on the inclusion of these monies in computing his income.

Petitioner argues that these monies are P.C.'s property and not income to him. Petitioner cites to the Uniformed Services Former Spouses' Protection Act (USFSPA). 10 U.S.C. § 1408. The USFSPA sets up a mechanism for the enforcement of Orders for child support, alimony, or property division. The USFSPA allows state courts to consider military retirement pay as property; it does not mandate them to do so. The applicable section at 10 U.S.C. § 1408(c) states:

> (1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court...

The problem is that the order requiring payment of monies from petitioner's military pension to P.C. are termed "alimony" under the terms of the divorce rather than part of the property settlement or equitable distribution found in numbered paragraphs 3, 4, and 5 in the Divorce Judgment Order and Decree. Based on the Divorce Judgment Order and Decree, the monies paid to P.C. cannot be considered her property.[2]

[2] Prior to Board consideration, petitioner informed the Hearing Officer that he filed a Motion with the Family Court to amend the Divorce Judgment Order and Decree to reflect that the parties intended the monies paid to P.C. to be a division of marital property, not alimony. The Family Court amended the Divorce Judgment and the Department has taken action to amend the patient share. The parties requested that the above decision be heard by the Board.

The remaining issue is whether alimony should be considered available income and included in petitioner's income in the determination of petitioner's patient share for Long-Term Care Medicaid.

The federal Medicaid Act directs states to only consider income and resources that are available to the applicant or recipient. 42 U.S.C. § 1396a(a)(17)(B). Available income is not defined. Congress gave the Agency of Health and Human Services authority to develop regulations and interpret the meaning of "available income".

The federal regulations addressing deductions from income are found at 42 C.F.R. §§ 435.725(c) and 435.726(c). These regulations set out certain required deductions from income including a personal needs allowance, maintenance needs for spouse, maintenance needs of family, and expenses for medical care not subject to third party payment. An optional deduction for home maintenance allowance is found in 42 C.F.R. § 435.725(c)(5).

Vermont has adopted regulations that mirror the federal regulations. The applicable regulations are found at M430 *et seq*. M430 provides that the Department determine patient share by computing a recipient's income and then deducting

allowable expenses. The allowable deductions are found in M432 and include:

> (a) a personal needs allowance or community maintenance allowance (M432.1);
>
> (b) home upkeep expenses, if applicable (M432.2);
>
> (c) allocations to community spouse or maintenance needs of family members living in the community, if applicable (M432.3); and
>
> (d) reasonable medical expenses incurred, if applicable (M420-M422).

In petitioner's case, he was granted the personal needs allowance and a medical expense deduction for his Medicare Part B payment. The community spouse allocation does not apply to ex-spouses. The Department sought guidance from the Centers for Medicare and Medicaid Services who confirmed that alimony is not an allowable deduction from income for the purposes of determining patient share.[3]

The Board dealt with the same issue in Fair Hearing No. 17,681. The facts were similar to this case. The ex-wife had income below the Federal Poverty Level even with payment of alimony. The petitioner's court ordered alimony and patient share were greater than his total income. The Board affirmed the Department and found there was no basis to

[3] The Department requested information from a number of states asking whether they granted a deduction for alimony. None of the states the Department contacted allowed a deduction for alimony.

disregard the applicable regulations that did not allow alimony payments as deductions. Implicit in this decision is an understanding that alimony, like child support, can be reduced or negated when there is a real and unanticipated change of circumstances such as reduced income or receipt of public benefits. 15 V.S.A. §§ 660 and 758.

The petitioner argues that a relatively recent decision by the South Dakota Supreme Court leads to a different result. Mulder v. South Dakota Department of Social Services, 675 N.W.2d 212 (2004). Mulder's sole source of income was Social Security deposited into his bank account after Medicare Part B was deducted. Pursuant to a divorce order, the bank automatically transferred funds to his ex-wife's account. The monies were designated alimony because federal law prevented taking a portion of social security benefits as property division. The South Dakota eligibility regulations (incorporating SSI regulations) were not fully incorporated into their benefits calculation (patient share) regulations. As a result, the court found South Dakota's use of the eligibility calculations when determining the amount of patient share to be arbitrary and unreasonable. The Court determined that counting alimony as part of available income was not reasonable. The reasoning is strained.

Moreover, other Courts have reached opposite conclusions when determining whether court ordered support should be considered available income under the Medicaid statute. Peura by and through Herman v. Mala, 977 F.2d 484 (9th Cir. 1992) (Alaska regulation allowed state to consider part of child support order as available income. Peura wanted his entire child support obligation to be deemed unavailable income. Court held that Alaska's regulation allowing a portion of child support payments to be considered available income did not contravene federal Medicaid Act. The Court gave deference to the federal Health and Human Service's interpretation that child support is available income). Emerson v. Steffen, 959 F.2d 119 (8th Cir. 992)(Interpretation of court ordered support payments permissible under federal Medicaid Act. The Court gave deference to federal interpretation that court ordered support is available income.). Himes v. Sullivan, 806 F. Supp. 413 (W.D.N.Y. 1992) (Dismissing challenge to interpretation that court ordered support is available income.).

Petitioner entered into a Divorce settlement over ten years ago. The Divorce settlement reflects what the parties considered fair at that time. Circumstances have drastically changed. Petitioner is now in a nursing home; his income is

insufficient to pay both his patient share and alimony. His desire to continue payments to his ex-wife is commendable. However, the Department has correctly applied the applicable regulations determining the amount of patient share. The Department's regulations and interpretation of available income in this case are consistent and permissible under federal Medicaid law.

Accordingly, the Department's decision is affirmed. 33 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

# # #